

APPEAL NO. 031834
FILED AUGUST 29, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 5, 2003. The hearing officer determined that appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the eighth quarter. Claimant appealed the good faith and SIBs entitlement determinations on sufficiency grounds. The file does not contain a response from respondent (carrier).

DECISION

We reverse and remand.

Because of loud static, a significant part of the audiocassette tape in this case is inaudible. We must reverse and remand for reconstruction of the record so this panel can fully consider the record developed at the hearing. See Section 410.203(a). We also must remand for other reasons as set forth below.

Claimant appeals the hearing officer's adverse good faith determination, contends that the decision is internally inconsistent, and asserts that certain findings, including Finding of Fact No. 5.a., conflict. Although claimant does not specifically contend that Finding of Fact No. 5.a. is itself in error, claimant does appeal the good faith determination and asks for a reversal of the hearing officer's decision. In order to resolve this case, we must also remand regarding good faith and the underlying findings in that regard. See *generally* Texas Workers' Compensation Commission Appeal No. 022655, decided November 25, 2002.

Claimant first notes that the hearing officer determined in Finding of Fact No. 5.a. that claimant "was unable to perform any type of work in any capacity" during the qualifying period. Claimant complains that the hearing officer also determined in Finding of Fact No. 4.b. that claimant did not make a good faith effort to obtain employment commensurate with her ability to work. Claimant asserts that these determinations are inconsistent. However, it is possible that a hearing officer could hold a belief that a claimant has no ability to work and also find that there is not a sufficient narrative from a doctor explaining why a claimant cannot work. In such a case, the hearing officer could find that claimant did not meet her burden regarding good faith, as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)). We do not conclude that Findings of Fact Nos. 5.a. and 4.b. are inconsistent. However, we do note that the hearing officer's general discussion of the evidence is inconsistent with Finding of Fact No. 5.a., which creates some confusion in this case and indicates that some sort of error was made. We also question whether the incorrect listing of the exhibits perhaps contributed to any possible error.

The hearing officer determined in Finding of Fact No. 5.a. that claimant “was unable to perform any type of work in any capacity” during the qualifying period. However, in the discussion portion of the decision, the hearing officer said, “Claimant’s evidence, both documentary and testimonial, was not persuasive in meeting the burden to prove entitlement to SIBs” The hearing officer had to believe at least some portion of claimant’s evidence in order to make the determination in Finding of Fact No. 5.a. and so the statement that none of claimant’s evidence is persuasive conflicts with this finding.¹ Because some portion of the decision appears to contain an error, there are internal conflicts in the decision, and as we are remanding for reconstruction of the record anyway, we also remand for the hearing officer to reconsider the good faith issue and resolve this inconsistency.

Claimant contends that the hearing officer erred in failing to admit Claimant’s Exhibit No. 7, which is a decision and order for claimant’s prior SIBs quarter. Claimant also contends that the hearing officer erred in determining that the February 4, 2003, report from Dr. G is not a sufficient narrative, noting that another hearing officer had determined that it was a sufficient narrative in a prior decision regarding the prior quarter. Claimant asserts that hearing officers should not be permitted to reach opposite conclusions about whether a narrative sufficiently explains why a claimant has no ability to work. Claimant contends that since the decision and order from the prior quarter was not appealed, the hearing officer in the case before us was bound to reach the same conclusions. We disagree. Neither the hearing officer nor the Appeals Panel is bound by a determination made by another hearing officer in an unappealed prior decision and order regarding the sufficiency of a narrative. Even if the hearing officer in this case had considered the decision and order from the prior quarter, the hearing officer would not be bound to make the same conclusions as the hearing officer made in the prior quarter. Regarding the exclusion of the exhibit, we conclude that any error was not reasonably calculated to cause nor did it probably cause the rendition of an improper judgment. Texas Workers’ Compensation Commission Appeal No. 92241, decided July 24, 1992; see *also Hernandez v. Hernandez*, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

Claimant next contends that the hearing officer erred in listing the exhibits in this case. We agree. From the portion of the tape that was audible, it appeared that claimant’s first 6 exhibits were admitted without objection and the 7th and last exhibit was not admitted. However, the hearing officer listed 11 exhibits for claimant. We were unable to hear all of the discussion regarding the exhibits. Because we are remanding on other grounds, we also remand for the hearing officer to correctly set forth the exhibits admitted and excluded in this case.

Claimant also contends the hearing officer erred in determining that claimant did not provide a narrative report from a doctor that specifically explained how the injury caused a total inability to work. Because we are remanding this case regarding the issue of good faith and ability to work, we also remand the issue of the sufficiency of the narrative and decline to address that issue at this time.

¹ Carrier did not offer evidence that claimant was totally unable to work.

In summary, we remand for the hearing officer to:

1. reconstruct the record;
2. reconcile the inconsistencies between the findings of fact and discussion portion of the decision and order, and correct any errors therein;
3. reconsider the determinations related to good faith and SIBs entitlement; and
4. correct the errors regarding the listing of the exhibits admitted and excluded.

We reverse the hearing officer's decision and order and remand for reconsideration of the good faith and SIBs entitlement determinations. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

According to information provided by carrier, the true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750
AUSTIN, TEXAS 78701.**

Judy L. S. Barnes
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Margaret L. Turner
Appeals Judge